

Message Text

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C O N F I D E N T I A L STATE 203562

MANILA FOR USDEL, CINCPAC ALSO FOR POLAD

E.O. 11652:GDS

TAGS: MARR,RP

SUBJ: PHILIPPINE BASE NEGOTIATIONS: CRIMINAL JURIS-
DICTION

REF: MANILA 11775 USDEL 184 DTG070430Z AUG 76

1. WE ARE STILL WORKING ON ACCEPTABILITY OF DEFINITION OF
OFFICIAL DUTY AND WHAT THAT DEFINITION WILL BE, IF ANY.

2. FOLLOWING COMMENTS ARE KEYED TO PROPOSED TEXT.

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A. PARA 2B. DELETION OF REFERENCE TO SECURITY OFFENSES APPROVED. WE ARE PREPARED TO MAKE CONCESSION TO PHILS RE INTER SE OFFENSES BUT DESIRE TO INCLUDE WORD "ONLY" AT END OF PARAGRAPH. THIS IS TO PROVIDE FOR SITUATION IN WHICH DEPENDENT IS A DUAL NATIONAL.

B. PARA 2D. INSTRUCTION WILL BE PROVIDED ASAP.

C. PARA 3H. WE HAVE NO OBJECTION TO YOUR PROPOSED LANGUAGE AS FAR AS IT GOES BUT DO NOT REPEAT NOT BELIEVE IT GOES FAR ENOUGH. WHAT HAPPENS IF THERE IS NO AD HOC SOLUTION? DOES THE SERVICEMAN SIT IN LIMBO INDEFINITELY AWAITING A DECISION AS TO WHICH COUNTRY WILL TRY HIM? THERE MUST REPEAT MUST BE A POINT WHERE JURISDICTION MAY BE EXERCISED BY THE UNITED STATES. WE SUGGEST INSERTION IN PARA 3D OF DRAFT ARTICLE THE FOLLOWING LANGUAGE DESIGNED TO DISGUISE THIS POINT WHICH MAY HELP THE PHILS SAVE FACE. DELETE PRESENT THIRD SENTENCE AND SUBSTITUTE NEW SENTENCE AS FOLLOWS. "THE UNITED STATES MAY EXERCISE JURISDICTION IN THE EVENT THE PHILIPPINE BASE COMMANDER EXPRESSES HIS CONCURRENCE WITH THE DETERMINATION OF THE U.S. FACILITIES COMMANDER OR DOES NOT REPLY WITHIN 10 DAYS OF SUCH NOTIFICATION, OR IF THE PHILIPPINE BASE COMMANDER INFORMS THE U.S. FACILITIES COMMANDER OF HIS NONCONCURRENCE WITHIN TEN DAYS OF SUCH NOTIFICATION AND THE PROCEDURES SET OUT BELOW DO NOT AFFIRMATIVELY RESOLVE THE ISSUE." FINALLY IN PARA 3H, IN ORDER TO PLACE A TIME LIMIT ON THE PROPOSED AD HOC SOLUTION DEVICE, DELETE "MAKE EVERY EFFORT TO ARRIVE AT" AND SUBSTITUTE "WITHIN AN ADDITIONAL TWENTY DAYS ACHIEVE."

D. PARA 3I. AFTER THE WORD "CLAIMANT" ADD "OR, IF THE MATTER HAS BEEN CONSIDERED BY THE APPROPRIATE AUTHORITIES OF THE GOP, AND THE U.S. HAS OFFERED TO SETTLE THE CLAIM IN THE AMOUNT RECOMMENDED BY THE SAID APPROPRIATE AUTHORITIES OF THE GOP, ETC." THIS INSERTION WOULD PUT SOME TEETH INTO THE ARTICLE AND JUSTIFY SUBMITTING MATTER TO PHIL AUTHORITIES FOR RECOMMENDATION.

3. EXCEPT AS NOTED ABOVE, PROPOSED TEXT APPROVED.
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4. COMMENT: WE ARE AWARE THAT THIS WILL NOT BE EASY TO NEGOTIATE. HOWEVER, IT SHOULD BE PERFECTLY CLEAR TO U.S. DELEGATION THAT: (A) IN THE ABSENCE OF AN INTERNATIONAL AGREEMENT, THE LOCAL COURTS HAVE THE POWER TO DECIDE WHETHER AN ACT WAS IN THE PERFORMANCE OF OFFICIAL DUTY OR NOT. (B) IN OFFICIAL DUTY CASES, WE DO NOT WAIVE EITHER THE RIGHT TO DETERMINE JURISDICTION OR TO EXERCISE IT ANY-

WHERE IN THE WORLD. WE NEVER HAVE. (C) THE RECENT IE SHIMA CASE IS INDICATIVE OF THE EXTRAORDINARY LENGTHS TO WHICH WE WILL GO IN ORDER TO MAINTAIN THIS POSITION. (DETAILS AVAILABLE UPON REQUEST.) (D) USDEL ALSO SHOULD BE AWARE OF PRESIDENTIAL COMMITMENT TO CONGRESS FOLLOWING GIRARD CASE IN 1956.

5. TAKING INTO ACCOUNT THAT YOU HAVE PROBABLY THOUGHT OUT THESE CONSIDERATIONS, AND YOUR COMMENDABLE EFFORTS TO RESOLVE THIS INTRACTABLE ISSUE, YOU ARE AUTHORIZED TO PURSUE EITHER OF THE FOLLOWING COURSES OF ACTION: (A) ATTEMPT TO NEGOTIATE TEXT PROVIDED ABOVE, HAVING IT BRACKETED IF NECESSARY. (B) ASCERTAIN PHIL WILLINGNESS TO AGREE ON OTHER CRIMINAL JURISDICTION PROVISIONS ON THE ASSUMPTION THAT YOUR PROPOSED TEXT COULD FORM THE BASIS OF SATISFACTORY AGREEMENT, PROVIDED HOWEVER, THAT AN EXCHANGE OF DIPLOMATIC NOTES WILL BE ACCOMPLISHED CONCURRENTLY WITH ENTRY INTO FORCE OF THE AGREEMENT, RECORDING AN AGREED INTERPRETATION THAT THE U.S. RIGHT TO EXERCISE JURISDICTION IS RESERVED SHOULD ALL OTHER GOOD FAITH EFFORTS FAIL. WE ARE NOT YET PREPARED TO AUTHORIZE WHAT MIGHT BE AN ULTIMATE FALLBACK, WHICH MIGHT TAKE THE FORM OF A DIPLOMATIC EXCHANGE RECORDING AN UNCHALLENGED U.S. INTERPRETATION AS ABOVE. KISSINGER

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